



## International Journal of Multicultural and Multireligious Understanding

<http://ijmmu.com>  
[editor@ijmmu.com](mailto:editor@ijmmu.com)  
ISSN 2364-5369  
Volume 6, Issue 4  
August, 2019  
Pages: 255-272

### Regulating Legal Relationships of Doctors and Hospitals to One Party with Patients to Other Parties in the Indonesian Civil Law System

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<http://dx.doi.org/10.18415/ijmmu.v6i4.990>

#### **Abstract**

The condition among the Indonesians nowadays indicated that there are many legal cases, especially in the medical disputes between doctors and hospitals on the one side towards their patients on the other side. The medical disputes are basically emerged because there is an inequality between patients expectation with reality that patients get. The first problem of this research is how are the legal relations of doctors and hospitals on the one side towards their patients on the other side under the Indonesian civil law system, and the second problem of this research is what are the criteria to determined doctors and hospitals could be liable under the civil law system towards their patients damaged in the medical disputes. The first objective of this research is to study and analyze how are the legal relations of doctors and hospitals on the one side towards their patients on the other side under the Indonesian civil law system, and the second objective of this research is to study and analyze what are the criteria to determined doctors and hospitals could be liable under the civil law system towards patients damaged in the medical disputes. The method used in approaching the problem of this research is normative juridical. The type of this research is descriptive analytics. The source of this research is from secondary data with using primary legal substance, secondary legal substance, and tertiary legal substance. Based on the result of the research, it can be concluded that are, first, the legal relations between doctors towards their patients in medical services emerged because there are therapeutic contractual and the regulations which is regulated in Civil Law Code Article Number 1233, while the legal relations between hospitals towards their patients included in common contractual which is regulated in Civil Law Code Article Number 1234, and also could emerged according to Civil Law Code Article Number 1367 (3). Second, the criteria for doctors and hospitals can be declared responsible for the loss of patients, are because of negligence by doing medical actions contrary to the standards operational procedures (SOP) and the service standards, and also because of negligence based on legislation.

**Keywords:** Civil Liability; Doctors; Hospitals; Patients; Indonesian Civil Law System

## Introduction

### A. Background

Every human being basically has the instinct to always relate to each other since he was born. This relationship is also a necessity for every human being, therefore by relating to each other he can meet the needs of his life. In addition it is related to each other also shows that humans are social creatures in addition to their position as individual creatures. All limitations, deficiencies and weaknesses that exist in humans also want it to always be in contact with others. The state of illness is an example that humans (sufferers) are weak, inadequate (sick) so that at that time they need someone who can fulfill their needs. The main need for that person is the need for someone else who can help cure his illness. The person in question is a doctor.

Today the medical profession has developed rapidly with the birth of specialization and also sub-specialization in the field of medicine. The doctor's profession is a noble profession because with his expertise in charge of helping to cure people who are facing health problems<sup>1</sup>. However, the noble nature of the medical profession does not necessarily make the bearers of the medical profession free from disputes or engage in legal issues with their patients who are the focus of their medical services or actions. According to the principle of law that everyone is equal before the law or everyone must be treated equally before the law. No matter how noble the medical profession is, a doctor must not be excluded from the same legal treatment. Medical disputes as a legal phenomenon are indeed relatively new when compared to other civil disputes, for example land ownership disputes, labor relations, debts and disputes, and so on.

The mention of the legal field governing the professions in the health sector in Indonesia such as doctors, pharmacists, paramedics and the fields and legal relationships between patients and doctors and hospitals there is no unity of terms. Kansil uses the term "*Health Law*" or which in English is referred to as "*Health Law*" and in Dutch it is referred to as "*Gezondheidrecht*"<sup>2</sup>. In addition to the term "*Health Law*" also known as the term "*Hukum Medis*" which in English is called the term "*Medical Law*"<sup>3</sup>. The symposium organized by the Ministry of Justice's National Law Development Agency uses the terms "*Hukum Medis*" and "*Hukum Kedokteran*" as translations of "*Medical Law*"<sup>4</sup>. According to Seno Adji, "*Medical Law is a professional law (beroepsrecht) which contains elements of criminal law and civil law.*"<sup>5</sup> Terminology or the term Medical Law is a narrower field because it only focuses on regulating the medical profession only and in foreign English literature. the known term is "*Medical Law*"<sup>6</sup>.

Case law in the field of health or "*Health Law*" more specifically Medical Law or "*Medical Law*" does not only occur in Indonesia but also occurs in developed countries such as Canada and the United States. This is evident from the development of legal literature or literature that discusses medical legal cases or the legal responsibilities of doctors and hospitals. Medical legal cases are thus a global

<sup>1</sup> Syahrul Machmud, *Penegakan Hukum Dan Perlindungan Hukum Bagi Dokter Yang Diduga Melakukan Medikal Malpraktek*, Mandar Maju, Bandung, 2008, p. 1.

<sup>2</sup> CST Kansil, *Pengantar Hukum Kesehatan*, Rineka Cipta, Jakarta, 1991, p. 1. Lihat juga Sri Siswati, *Etika dan Hukum Kesehatan dalam Perspektif Undang-Undang Kesehatan*, Rajawali Pers, Jakarta, 2013, p. 2. See also Desrizza Ratman, *Aspek Hukum Informed Consent dan Rekam Medis dalam Transaksi Terapeutik*, Keni Media, Bandung, 2013, p. 15.

<sup>3</sup> Michael Davis, *Text Book on Medical Law*, Blackstone Press Limited, London, 1996, p. 3.

<sup>4</sup> Badan Pembinaan Hukum Nasional Departemen Kehakiman, "*Symposium Hukum Kedokteran (Medical Law)*", Jakarta, 1986.

<sup>5</sup> Oemar Seno Adji, "*Hukum Kedokteran (Medical Law) Aspek Hukum Pidana/Perdata*", Makalah pada Simposium Hukum Kedokteran (Medical Law), BPHN, Jakarta, 1986, p. 35-37.

<sup>6</sup> Michael Davis, *op. cit.*, p. 4.

phenomenon. In the United States, various laws in the medical or health sectors have been enacted such as the Offenses Against the Person Act of 1861, the Mental Health Act 1959, the Human Tissue Act of 1961 and the Abortion Act of 1967<sup>7</sup>.

In recent years there have been a number of cases that have arisen, namely lawsuits from patients who claim compensation for feeling aggrieved, demanding due to mistakes or negligence made by doctors or health workers in carrying out their work. This is a concern of the health profession and the legal profession. Cases that have attracted the attention of the public are cases that afflict three obstetricians, (Dr. Dewa Ayu Sasiary Prawani, Dr. Hendry Simanjuntak and Dr. Hendy Siagian) which by the District Court judges in 2011 were given a free verdict, but at the Supreme Court level these three doctors it was found guilty of malpractice against Julia Fransiska Makatey<sup>8</sup>.

The emergence of rights and obligations as a result of the legal relationship between the doctor and the patient which then has the potential for disputes between doctors and patients or medical disputes. In an effort to avoid or reduce the number of medical disputes that occur, it is necessary to understand the legal relationship between doctors and patients. From this legal relationship that will give birth to legal actions and lead to legal consequences. In a legal consequence, things that cannot be separated are about who is responsible, to what extent responsibility can be given. A study is needed on how doctors give responsibility for losses suffered by patients in a medical service<sup>9</sup>.

Medical disputes have occurred in the past in Indonesia, even during the Dutch colonial period of 1938 there had been cases of medical disputes<sup>10</sup>. In the Netherlands itself in 1930, an X-ray doctor was sued by his patient, a 20-year-old woman who suffered the consequences of x-rays or radiation. Hoge Raad (Supreme Court of the Netherlands) sentenced doctors to pay compensation consisting of medical expenses, mourning money, money lost salary<sup>11</sup>. It is no exaggeration to say that medical cases will often occur in the future in line with the growing legal awareness of citizens, especially patients.

Both fields of law (criminal law and civil law) have their own characteristics when viewed from the aspect of enforcement of legal norms. Criminal law enforcement is carried out by law enforcement agencies, namely the police after a complaint report or without a complaint report and the public prosecutor who brought a legal case to the court table. The prosecutor submits criminal charges not solely for the benefit of the victim's patient or reporter but also for the benefit of the community because criminal law is a field of public law that protects the collective rights of the public or the public. Meanwhile, civil law is related to civil rights whose law enforcement efforts are through the filing of a lawsuit to the court on an initiative or carried out by a person or group of people or legal entities that feel disadvantaged against the party that is considered to cause harm.

In the study of legal relations, it is regulated in Article 1313 of the Civil Code which is "An agreement is an act by which one or more people commit themselves to one or more other people." Article 1313 is part of Book III Chapter II of the Code The Civil Code entitled "*Agreements that were born from agreements*." In the aspect of health law, the doctor's relationship with the patient is intertwined in a binding transaction or therapeutic contract. Each party, namely those who provide services, and those who receive services have rights and obligations that must be fulfilled. In this

<sup>7</sup> Amri Amir, *Bunga Rampai Hukum Kesehatan*, Widya Medika, Jakarta, 1997, p. 49-50.

<sup>8</sup> Yussy A. Mannas, "Hubungan Hukum Dokter dan Pasien Serta Tanggung Jawab Dokter Dalam Penyelenggaraan Pelayanan Kesehatan", *Jurnal Cita Hukum (Indonesian Law Journal)* FSH UIN Syarif Hidayatullah Jakarta Vol.6 No.1, 2018.

<sup>9</sup> *Ibid.*

<sup>10</sup> Mahkamah Agung Republik Indonesia, *Bunga Rampai Tentang Medical Malpractice*, Jilid II, Mahkamah Agung Republik Indonesia, Jakarta, 1992, p. v.

<sup>11</sup> Mahkamah Agung Republik Indonesia, *Bunga Rampai Tentang Medical Malpractice*, Jilid I, Mahkamah Agung Republik Indonesia, Jakarta, 1992, p. 36-37.

connection, the issue of the Medical Action Agreement (PTM) arises. This means that on one hand the doctor (the team of doctors) has the obligation to make the best diagnosis, treatment and medical action according to his thoughts and considerations, but on the other hand the patient or the patient's family has the right to determine what medical treatment or action to go through<sup>12</sup>.

Informed consent according to Komalawati is "*An agreement / approval of patients for medical efforts to be undertaken by doctors against him, after patients get information from doctors about medical activities that can be done to help themselves, accompanied by information about all risks that may occur.*"<sup>13</sup> Informed consent is a process that shows effective communication between doctor and patient, and the meeting of thoughts about what will and what will not be done to the patient. Furthermore, informed consent is seen from the legal aspect not as an agreement between two parties, but rather towards unilateral agreement on services offered by another party.

Based on the description above, the approval of medical action / informed consent is expected to be in accordance with applicable regulations, namely ethical, moral, and patient autonomy. Hermien Hadiati Koeswadji quoted Beauchamp's opinion, "That informed consent is based on the principles of ethics, morals and patient autonomy." This principle contains two important things, namely: First, everyone has the right to decide freely what he chooses based on adequate understanding. Second, the decision must be made in a situation that makes it possible to make choices without interference or coercion from other parties. Because these people are autonomous, information is needed to hold considerations in order to act in accordance with these considerations<sup>14</sup>.

In comparison, the relationship between doctors and hospitals on the one hand and patients on the other hand needs to examine the norms of generally accepted laws such as the Civil Code (hereinafter referred to as the Civil Code) and those with special coverage in the health sector such as the Law Number 36 of 2009 concerning Health (hereinafter referred to as the Health Act), Law of the Republic of Indonesia Number 29 of 2004 concerning Medical Practices (hereinafter referred to as Law of Medical Practices), and Law of the Republic of Indonesia Number 44 of 2009 concerning Hospitals ( hereinafter referred to as the Hospital Law). All three of these laws contain the rights and obligations of hospitals and doctors and of course the rights and obligations of patients in legal relations with the hospital and doctors.

Given that in the past several cases of disputes have arisen as mentioned in the previous section, it is expected that in the future disputes between patients, doctors and hospitals will increase along with the increase in knowledge and understanding of society in general and patients in particular regarding their rights in relation to health services. Based on that, it is appropriate and necessary for legal academics to examine the concept of legal liability. Liability (*aansprakelijkheid* in Dutch, *liability* in English) is an important concept to determine or be the basis for judges to be able to sentence to legal subjects both human and legal entity in the form of obligations to do something to other parties due to the actions of people or or the legal subject after going through the judicial process<sup>15</sup>.

Legal liability is known both in the civil law system and in criminal law<sup>16</sup>, but this research focuses on assessing the civil and physician accountability of their patients. In conducting a study of doctor and hospital civil liability to patients, it is necessary to first examine the legal relationship between doctors and hospitals on the one hand and patients on the other, namely whether the relationship is

<sup>12</sup> Hendrojono Soewono, *Batas Pertanggungjawaban Hukum Malpraktek Dokter dalam Transaksi Terapeutik*, Srikandi, Surabaya, 2007, p. 38.

<sup>13</sup> Adami Chazawi, *Malapraktik Kedokteran*, Bayumedia Publising, Jakarta, 2005, p. 84

<sup>14</sup> Hermien Hadiati Koeswadji, *Hukum Kesehatan (Studi tentang Hubungan Hukum dalam mana Dokter Sebagai Salah Satu Pihak)*, Citra Aditya Bakti, Bandung, 1998, p. 23.

<sup>15</sup> CST Kansil, *op. cit.*, p. 250.

<sup>16</sup> Hasrul Buamona, *Tanggungjawab Pidana Dokter dalam Kesalahan Medis*, Parama Publishing, Jakarta, 2015, p. 43.

contractual or contractual or arises because of illegal acts because in the civil law field a person or legal subject may be subject to punishment for doing or not taking certain actions when he fails to fulfill his legal obligations which then has caused harm to another person or legal subject. According to civil law, legal obligations can be sourced from contractual relationships or agreements and can be sourced from statutory provisions.

Based on this background, legal cases and especially medical disputes between doctors and hospitals on the one hand and patients on the other and academic interest in the study of medical law have developed, so the authors are interested in analyzing and examining more deeply about this matter into a study with the title **"Regulating Legal Relationships of Doctors and Hospitals To One Party With Patients to Other Parties in the Indonesian Civil Law System"**.

### *B. Problem Formulation*

Based on the background description of the problem, the problem can be formulated as follows:  
*How is the Regulating Legal Relationships of Doctors and Hospitals To One Party With Patients to Other Parties in the Indonesian Civil Law System?*

## **Discussion**

### *A. Legal Relations Between Doctors and Patients in the Indonesian Civil Law System.*

The legal relationship between doctors and patients has occurred since ancient times (ancient Greek times), doctors as a person who provides treatment to people who need it. This relationship is a very personal relationship because it is based on the patient's trust in the doctor called the therapeutic transaction<sup>17</sup>. The very personal relationship by Wilson is described as the relationship between the priest and the congregation who is expressing his feelings. Personal recognition is very important for self-exploration, requiring protected conditions in the consultation room. The legal relationship between doctors and patients begins with a pattern of vertical paternalistic relationships such as between fathers and children who depart from the principle of *"father knows best"* which gives birth to relationships that are paternalistic. In this connection the position of the doctor and the patient is not equal, that is, the position of the doctor is higher than the patient because the doctor is considered to know about everything related to the disease and its cure. Whereas the patient did not know anything about it so the patient gave his fate entirely in the hands of the doctor<sup>18</sup>.

A legal relationship arises when a patient contacts a doctor because he feels something is felt that endangers his health. His psychobiological state gave a warning that he felt sick, and in this case the doctor was considered capable of helping him, and provided assistance. Thus, the position of the doctor is considered higher by the patient, and his role is more important than the patient. Instead, doctors based on the principle of *"father knows best"* in this paternatistic relationship will strive to act as *"good fathers"*, who are careful, careful to heal patients<sup>19</sup>.

<sup>17</sup> Veronika Komalawati, *Peranan Informed Consent Dalam Transaksi Terapeutik*, Citra Aditya Bakti, Bandung, 1999, p. 38.

<sup>18</sup> Soerjono Soekanto, *Hak dan Kewajiban Pasien*, Ind-Hill-Co, Jakarta, 1989, p. 161.

<sup>19</sup> Sofwan Dahlan, *Hukum Kesehatan Rambu-rambu Bagi Profesi Dokter*, BP UNDIP, Semarang, 2000, p. 32.

In seeking to cure this patient, the doctor is equipped with Lafal Oath and the Indonesian Medical Code of Ethics. The vertical relationship pattern that gave birth to the paternalistic nature of the doctor to this patient contained both positive and negative effects. The positive impact of the vertical pattern that gave birth to the concept of this paternalistic relationship is very helpful for patients, in terms of lay patients against their illness. Conversely, negative effects can also arise, if the doctor's actions in the form of steps in seeking patient healing are doctor's actions that limit patient autonomy, which in the history of cultural development and basic human rights has existed since birth. This paternalistic vertical relationship pattern shifts to the contractual horizontal pattern<sup>20</sup>.

There are 2 (two) types of legal relations between doctors and patients in health care, namely relationships due to therapeutic agreements and relationships due to laws and regulations. In the first relationship, it starts with an agreement (not written) so that the will of both parties is assumed to be accommodated when the agreement is reached. The agreement reached was in the form of approval of medical action or even rejection of a medical action plan. Relationships due to laws and regulations usually arise because of obligations imposed on doctors because of their profession without the need for patient approval<sup>21</sup>.

Both of these relationships give birth to legal responsibilities, professional responsibilities and ethical responsibilities of a doctor. A doctor who commits an offense can be prosecuted in several courts, for example in the field of law there is a civil court, criminal court and administrative court. In addition doctors can also be brought before the ethical court of professional organizations (MKEK and MKEKG), and the Professional Discipline Court by (MKDKI).

#### 1. Relationship Due to Therapeutic Agreement

The legal relationship between doctors and patients in the first health service is due to the occurrence of a therapeutic agreement giving birth to a contractual horizontal legal aspect that is "*inspanningsverbintenis*" which is a legal relationship between 2 (two) legal subjects (doctors and patients) who have equal status giving birth to rights and obligations for the parties concerned. This legal relationship does not promise anything (healing or death), because the object of the legal relationship is in the form of doctors' efforts based on their knowledge and experience (dealing with illness) to cure patients.

The doctor's relationship with the patient is based on a relationship of trust. Patients believe that doctors are always professionals in the field of health having the ability, skills, and sincerity of intention to help themselves in accordance with the knowledge they mastered. Conversely, doctors also believe that patients who ask for help have a serious intention to try and work together with doctors to overcome the illness. Therefore, the relationship between the doctor and the patient is a very personal relationship. In other words, the relationship between doctor and patient is a cooperative relationship to make health efforts based on the good faith and trust of each party<sup>22</sup>.

The first paragraph of the preamble to the Indonesian Medical Code of Ethics attached to the Decree of the Minister of Health Number 434 / MENKES / SK / X / 1983 dated October 28, 1983 regarding the entry into force of the Indonesian Medical Code of Ethics, affirmed that since the beginning of the written history of humanity there has been a known relationship of trust between two people, namely the healer and sufferer. In modern times the relationship is called a therapeutic

<sup>20</sup> *Ibid.*

<sup>21</sup> M. Nasser, "*Sengketa Medis Dalam Pelayanan Kesehatan*", Makalah pada Annual Scientific Meeting UGM-Yogyakarta, Lustrum FK UGM, 3 Maret 2011, p. 1.

<sup>22</sup> Hermien Hadiati Koeswadji, *op. cit.*, p. 36.

(transaction) relationship between doctor and patient, which is enforced in an atmosphere of trust and confidentiality and is always overwhelmed by all the emotions, hopes and concerns of human beings.

The contractual legal relationship that occurs between the doctor and the patient does not begin when the patient enters the doctor's office as many people suspect, but rather since the doctor declares his or her oral or implied statement by showing an attitude or action which concludes the willingness, such as accepting registration, providing serial numbers, providing and recording medical records, and so on. In other words the therapeutic relationship also requires a doctor's willingness. This is in accordance with the consensual and contractual principles.

The engagement legal perspective is based on the provisions of Book III of the Civil Code. A therapeutic agreement is a form of legal relationship or engagement, wherein the doctor as a professional with a serious intention to make the best medical efforts in helping patients overcome their health problems. In every legal relationship or engagement that arises, there are rights and obligations. Likewise in the legal relationship between doctors and patients can lead to reciprocity rights and obligations, because doctors with a serious intention to make efforts to help patients as well as possible, then the engagement is called an engagement agreement or called "*verbinteniss inspannings*"<sup>23</sup>.

Article 1233 of the Civil Code, states that "*Every engagement is born by agreement or by law.*" Thus, it can be concluded that an agreement can arise either from an agreement agreed by both parties, or the law. The article is the legal basis for the legal relationship between the doctor and the patient or what is called a therapeutic transaction. Furthermore Article 1234 of the Civil Code, states that "*Each engagement is to give something, to do something, or not to do something.*" The provisions of this article are intended as a law about the various objects of an engagement or so-called achievement. This article can also be used as a legal basis for the object of engagement in therapeutic transactions, which is to carry out certain medical actions.

Certain medical actions can also be carried out due to an agreement between the doctor and the patient which results in a therapeutic agreement. Article 1313 of the Civil Code, states that "*An agreement is a legal act by which one or more people commit themselves to one or more people.*" However, the nature of the legal relationship between a doctor and a patient is the relationship of giving assistance beginning when the patient goes to the doctor to ask for his help, related to health problems he suffered. If the patient comes and meets the doctor, it means the patient is willing to bond with the doctor. If the doctor then receives the patient and therapeutic communication occurs, then the legal relationship between the provision of assistance has occurred and consequently an obligation arises to the doctor for the sake of the law as Article 1354 Civil Code. Desired or undesirable, both by doctors and by law, the law gives legal consequences to the parties as regulated in the provisions of Article 1354-1359 Civil Code<sup>24</sup>.

Therapeutic agreements are not specifically regulated and are not a form of agreement known in the Civil Code. However, Book III of the Civil Code adopts an open system as implied in the provisions of Article 1319 which confirms that "All agreements, whether they have a special name, or are not known by a certain name, are subject to general rules, contained in the chapter this and the previous chapter. "Therefore, if mutual agreement arises between the doctor and the patient or family for further health efforts, in the form of certain medical actions that require certain financing as a consequence of providing professional health services, then therapeutic transactions can be

<sup>23</sup> Al Purwohadiwardoyo, *Etika Medis*, Penerbit Kanisius, Yogyakarta, 1989, p. 13.

<sup>24</sup> Sri Siswati, *op. cit.*, p. 11.

categorized as agreements. therapeutic. As such, the general compelling provisions in treaty law also apply to parties to a therapeutic agreement<sup>25</sup>.

Regarding the legality requirements for the therapeutic agreement based on Article 1320 of the Civil Code, which states that for the legality of the agreement required 4 (four) conditions as follows<sup>26</sup>:

- a. Agree to those who bind themselves (*toestemming van degene die zich verbinden*)  
Legally, what is meant by an agreement is the absence of oversight, or coercion, or fraud (Article 1321 of the Civil Code). The time of the agreement when it is related to Article 1320 of the Civil Code is the time of agreement between the doctor and the patient that is when the patient states his complaint and is responded by the doctor. Here the patient and the doctor attach themselves to a therapeutic agreement whose object is a healing effort. If healing is the main goal it will be difficult for doctors because the severity of the disease and the body's resistance to the drug of each patient is not the same. The same drug can not be sure the same results in each patient.
- b. Ability to make an engagement (*bekwaamheid om eene verbintenis aan te aen*)  
Legally, what is meant by the ability to make an engagement is one's ability to bind oneself, because it is not prohibited by law. This is based on Article 1329 and 1330 Civil Code. According to Article 1329 of the Civil Code that "Everyone is competent to make an agreement, if by law is not declared incompetent." Then, in Article 1330 of the Civil Code, it is stated that "People who are declared incompetent are people who are not yet mature , those who are put under custody, women, in terms of what is stipulated by the law and in general everyone for whom the law has prohibited certain agreements from being made. "In therapeutic transactions, the recipient of medical services, consisting of adults who are capable of acting, adults who are not capable of acting, who need the approval of their helpers, minors who need the consent of their parents or guardians. In Indonesia, there are various regulations that state the limits on adulthood including:
  - 1) According to Article 330 of the Civil Code states that "Not yet mature are those who have not reached the age of 21 years and not / not married." Means that adults are aged 21 years or have been married even though not yet 21 years old, if the marriage breaks before age 21 years, not returned and the state is not yet mature.
  - 2) According to Article 47 Paragraph (1) of Law Number 1 of 1974 concerning Marriage, it states that "*Children who have not reached 18 years of age or have never entered into marriage are under the authority of their parents as long as they are not deprived of their authority.*" Paragraph (2), stating that "*Parents represent the child regarding all legal actions inside and outside the court.*" Then Article 50 Paragraph (1), states that "*Children who have not reached the age of 18 years or have never entered into marriage, who are not in marriage under the authority of parents, is under the authority of the guardian.*" Paragraph (2), states that "*This trust is about the child's personal wealth or property.*"
  - 3) According to Chapter XIV Islamic Law Compilation disseminated based on Presidential Instruction Number 1 of 1991 dated June 10, 1991 concerning Child Care in Article 98 listed:
    - a) The age limit for children who are able to stand alone / adults is 21 years, as long as the child is not physically or mentally disabled or has never married (Paragraph (1)).

<sup>25</sup> Wila Chandrawila, *op. cit.*, p. 35.

<sup>26</sup> Veronika Komalawati, *op. cit.*, p.155.



- b) Parents who represent the child regarding all legal actions inside and outside the court (Paragraph (2)).
- c) The religious court can appoint a close relative who is able to fulfill this obligation if both parents are unable (Paragraph (3)).

From the various regulations mentioned above, it turns out that there are several regulations which mention the age of 21 years as an adult age limit. Likewise, the adult limit specified in Article 8 Paragraph (2) Regulation of the Minister of Health Number 585 / Men.Kes / Per / IX / 1989, which is followed up with SK Dirjen Yan.Med April 21, 1999 which states that adult patients as referred to in Paragraph (1) is 21 years old or married.

- c. A certain thing (een bepaald onderwerp)

This particular thing that can be connected with the object of the therapeutic agreement / transaction is the healing effort. Therefore the object is a healing effort, the results obtained from the achievement of these efforts cannot or may not be guaranteed by a doctor. Moreover, the implementation of the healing effort does not only depend on the seriousness and expertise of doctors in carrying out their professional duties, but many other factors play a role, such as the patient's resistance to certain drugs, the severity of the disease and also the role of the patient in carrying out the doctor's orders for the patient's benefit. own.

- d. A valid cause (geoorloofde oorzaak)

According to Article 1337 of the Civil Code it is stated that "A cause is prohibited, if prohibited by law or if it is contrary to good decency or public order." Thus, what is meant by a valid cause is a cause that is not prohibited by the law, decency or public order.

An agreement that has fulfilled the legality requirements of the agreement as regulated in Article 1320 of the Civil Code, according to Article 1338 of the Civil Code:

- a. "All agreements made legally apply as a law to those who make them.
- b. An agreement cannot be withdrawn other than by agreeing between the two parties, or for reasons which the law states are inadequate for that.
- c. An agreement must be carried out in good faith. "

## 2. Relationships Due to Regulations

The legal relationship between doctors and patients in the second health service is due to the laws and regulations. Relationships due to laws and regulations usually arise because of the obligations imposed on the doctor because of his profession without the need for patient approval. Legal relations that arise always have two aspects whose contents on one side are the rights and obligations of the other party. There are no rights without obligations and vice versa that there are no obligations without rights.

Patient's right in this case is the right to medical information contained in the approval of medical action (informed consent), while the doctor's obligation is to provide medical information to patients contained in the approval of medical action (informed consent). Before 1988 there were no rules governing informed consent. The following are some rules in Indonesia that regulate informed consent, both those that are still valid and those that are no longer valid:

- a. Law of the Republic of Indonesia Number 23 of 1992 concerning Health.
- b. Law of the Republic of Indonesia Number 29 Year 2004 concerning Medical Practices.
- c. Law of the Republic of Indonesia Number 36 of 2009 concerning Health.
- d. Law of the Republic of Indonesia Number 44 of 2009 concerning Hospitals.

- e. Republic of Indonesia Government Regulation Number 32 of 1996 concerning Health Workers.
- f. Regulation of the Minister of Health of the Republic of Indonesia Number 585 / Men.Kes / Per / IX / 1989 of 1989 concerning Approval of Medical Measures.
- g. Regulation of the Minister of Health of the Republic of Indonesia Number 290 / Men.Kes / Per / III / 2008 of 2008 concerning Approval of Medical Measures.
- h. Decree of the Director General of Medical Services Number HK.00.06.3.5.1866 / 1999 Year 1999 concerning Guidelines for Approval of Medical Measures.
- i. PB IDI Decree Number 319 / PB / A4 / 88 of 1988

A new informed consent is valid given by the patient if it fulfills at least three elements as follows<sup>27</sup>:

- a. Information disclosure is sufficient given by the doctor.
- b. Patient competence in giving consent.
- c. Volunteerism.

The main forms of patient consent are known<sup>28</sup>:

- a. Effective agreements that include:
  - 1) Expressive approval, i.e. if in fact the patient will undergo a medical treatment procedure in the course of handling the disease.
  - 2) Non-expressive consent, i.e. if based on the attitude and actions of the patient it can be concluded that the patient concerned gave his consent.
- b. The implicative agreement, especially in an emergency situation with the threat of death for patients both adults and children so that there is no need to question whether or not the agreement is intended, then in such circumstances it is concluded (implicative) that the patient's consent is concerned and the doctor is fully obliged to carry out any reasonable efforts to save the patient<sup>29</sup>.

Doctors have a legal obligation to disclose information to their patients, so patients can make appropriate treatment choices and approvals. The patient's right to information is the obligation of the doctor to provide it. This means that the patient has the right (without having to ask) to get information. He is also entitled to provide answers to questions asked except<sup>30</sup>:

- a. On the use of a placebo.
- b. If the information will even cause harm to patients.
- c. Minors and people who are distracted, because they are considered intellectually incapable of understanding / understanding the information given.

Patients in certain cases generally must be notified if surgery or other medical actions that will be carried out involve<sup>31</sup>:

- a. Hospitalized for a rather long period of time.
- b. Will lose a function.
- c. Dangerous for the soul.
- d. If the possibility of recovery is very small.

Matters that need to be informed to the patient or family include<sup>32</sup>:

- a. The reason for the need for medical treatment.

<sup>27</sup> Munir Fuadi, *op. cit.*, p. 48-49.

<sup>28</sup> There are two forms of approval of medical action: 1. Implied consent (considered given), 2. Express consent (stated), Implied consent is given under normal circumstances, meaning that the doctor can catch the approval of the medical action from the cues made / given by the patient, and the patient in for emergencies, express consent can be expressed verbally and in writing. Seek to Amir, *op. cit.*, p. 31-32.

<sup>29</sup> Veronica Komalawati, *op. cit.*, p. 89.

<sup>30</sup> J. Guwandi, *op. cit.*, p. 61

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

- b. The nature of the medical action; experiment, non experiment.
- c. The purpose of medical action; diagnostic, therapeutic, rehabilitative, promotive.
- d. The risk.
- e. As a result of unpleasant follow-up.
- f. There are still alternative medical actions or not.
- g. Losses that will or may be experienced if you refuse the medical action.

The information is sufficiently to be conveyed orally by taking into account the level of education of those who are entitled to receive it. Of course, it takes its own art so that the person is able to understand and then approve, because the provision of information will be in vain if in the end the patient or family rejects the medical action to be carried out by the doctor. What should not be forgotten is that giving information must not be deceptive, force or create fear because these three things will make the agreement given becomes legally flawed<sup>33</sup>.

Article 45 Paragraph (3) of the Medical Practice Law states that "The explanation given covers:

- a. Diagnosis and procedure of medical treatment.
- b. The purpose of the medical treatment.
- c. Other alternative actions and risks.
- d. Possible risks and complications.
- e. Prognosis for possible actions. "

Article 7 Paragraph (3) Regulation of the Minister of Health Number 290 Year 2008, states that "The explanation of the medical measures referred to in paragraph (1) shall at least include:

- a. Diagnosis and procedure of medical action.
- b. The purpose of the medical action taken.
- c. Other alternative actions, and risks.
- d. Possible risks and complications.
- e. Prognosis for actions taken.
- f. Estimated financing. "

Patient or family consent is an exercise of the patient's basic right to health care and the right to self-determination that must be recognized and respected<sup>34</sup>. Actually the oral consent given by the rightful person is sufficient for the doctor to be the basis for medical intervention. It can even be given in the form of an implied consent by showing attitudes that give the impression of agreeing. But both of these methods can be troublesome to doctors if behind the day is denied, unless there are witnesses who witnessed. The consent form provided contains the acknowledgment that has been given information and has fully understood and subsequently agreed to the medical action recommended by the doctor<sup>35</sup>.

Minister of Health Regulation 585 of 1989 regulates medical approval as follows:

- a. Consent was given by adult patients who were in a conscious and mentally healthy condition with the criteria of being 21 years old or already married (Article 8).
- b. For adult patients who have been under control (curatele) or suffer from mental disorders, the consent is given by parents / guardians / curators (Article 9).
- c. For patients under the age of 21 who do not have parents / guardians and / or parents / guardians unable to attend, consent is given by the family or landlady (Article 10).

<sup>33</sup> Sofwan Dahlan, *op. cit.*, p. 43

<sup>34</sup> Syahrul Machmud, *op. cit.*, p. 169.

<sup>35</sup> Sofwan Dahlan, *op. cit.*, p. 44. Seek to Hendrojo Soewono, *Perlindungan Hak-Hak Pasien dalam Transaksi Terapeutik (Suatu Tinjauan Yuridis Setelah Berlakunya Undang-Undang Nomor 29 Tahun 2004 tentang Praktik Kedokteran)*, Srikandi, Surabaya, 2010, p. 16.

- d. In case the patient is unconscious / unconscious and is not accompanied by a close relative and is medically in a state of emergency and / or emergency that requires immediate medical action for his interests, no agreement from anyone is needed (Article 11).

Article 13 Permenkes Number 290 Year 2008 states:

- a. "Approval is given by competent patients or immediate family.
- b. (1) An assessment of the patient's competence as referred to in paragraph (1) may be carried out by a doctor or dentist before any medical action is taken.
- c. In the event that there is doubt as to the consent given by the patient or his family the doctor or dentist can make a request for re-approval. "

Indonesia does not yet have a law that specifically regulates the age of competence for treatment approval. However, because the doctor's relationship with the patient is a contractual relationship, the reference that must be used is the Civil Code. This means that the age of competence for treatment approval is 21 years. It's just wise in the age issue of competence to equate matters of saving the lives of children with other civil matters.

In the husband and wife agreement is needed if the medical action taken meets the requirements<sup>36</sup>:

- a. The medical action is non therapeutic.
- b. Influence them as a whole pair.
- c. The influence is permanent.

According to Permenkes Number 585 of 1989, the person responsible for the implementation of the information and approval was the doctor, in the case of being carried out in a hospital / clinic, the hospital / clinic was responsible. However, not all patients are fulfilled their right to informed consent. The exceptions are as follows:<sup>37</sup>

- a. Those who have not been able to make decisions independently.
- b. Those who really cannot give rational decisions, for example crazy people or mentally retarded, in which case approval must be given by the supervisor or guardian.
- c. Parties who are temporarily unable to give consent such as a patient in an emergency, are not self-conscious, whose family is unknown or difficult to contact.
- d. Therapeutic privilege, i.e. if the doctor can prove that the doctor has a reasonable belief that disclosing information to the patient will be more dangerous to the patient, for example information that can cause adverse psychological effects on the patient.
- e. Another exception is in the case of medical actions that must be carried out within the framework of government programs where those actions are carried out in the interests of the public at large, then approval of medical measures is not required.

Emergency situation is the translation of emergency. According to Hirnby in the Oxford Advanced Learner's Dictionary of Current English, the term emergency means serious happening or situation needing prompt action. So in a state of emergency must be immediately and immediately taken rescue action. If viewed in terms of medical law, what is meant by an emergency situation is a condition where:<sup>38</sup>

- a. There is no longer an opportunity to ask for informed consent from patients or immediate family members (next of kin).
- b. There's no time to procrastinate.
- c. An action must be taken immediately.
- d. To save the life of a patient or member of his body (life or limb saving).

<sup>36</sup> Sofwan Dahlan, *op. cit.*, p. 46-48.

<sup>37</sup> Desriza Ratman, *loc. cit.*

<sup>38</sup> Ermawati Dalami, *op. cit.*, p. 32.

The justification for the exception of the principle of informed consent in an emergency is based on the following legal theories<sup>39</sup>:

- a. Need theory; it is a human need to be able to save itself from death or disease.
- b. Implicit consent theory; in a state of legal emergency it is assumed that if the patient is conscious, the patient will approve the doctor's actions, because these actions are the best for the patient himself and save his life.
- c. Zaakwaarneming theory; if someone voluntarily takes care of another person, whether known or unknown by the person who has the matter, he is obliged to take care of it to completion and the person whose business has been taken care of, must also compensate the costs and costs incurred by the voluntary administrator.
- d. Undertaking theory; this theory applies in England and Scotland which have similarities with the theory of zaakwaarneming.
- e. Good Samaritan Theory; enforced in America. A person cannot be blamed for contributors negligence if he helps others who are in a state of danger or emergency, provided that help is given properly and not careless / negligent.

Seeing the development of legal awareness in society today, especially in this reform era, the regulation on informed consent is deemed necessary to be more complete, and refined, as well as to improve its regulation in the form of a law, this is very important both in the interests of patients and the interests of doctors<sup>40</sup>.

### *B. Legal Relations Between Hospitals and Patients in the Indonesian Civil Law System*

The hospital as one of the health service facilities is part of the health resources that are very much needed in supporting the implementation of health efforts. The delivery of health services in hospitals has very complex characteristics and organizations. Different types of health workers with their scientific devices interact with each other. Medical science and technology are developing very rapidly which must be followed by health workers in the context of providing quality services, making the complexity of the problems in the hospital.

In general, in a hospital there are many things that are decided in each level (echelon) and each field which can be said to affect the success or failure of the provision of care / treatment services. Furthermore, it can be said that there is a multi-management and service factor in "*good faith*" (*goede trouw, good faith*) and the element of "*trust*" (*trust, vetrouwen*) plays a decisive role. In the hospital everything depends on the culprit<sup>41</sup>.

Basically, the hospital functions as a place to cure illnesses and restore health and the intended function has the meaning of responsibility which should be the responsibility of the government in improving the level of welfare of the community. The statutory regulations which form the basis of the organization of hospitals in Indonesia are the Hospital Law. The existence of this law is intended to provide legal certainty and protection to improve, direct and provide the basis for hospital management.

Unfortunately lately, disputes between patients and hospitals and health care workers have become the focus of mass media coverage. But not all of these reports bring benefits to the community, even on the contrary. For example, reporting about malpractice can make people lose faith in the medical

<sup>39</sup> Munir Fuady, *op. cit.*, p. 66-69.

<sup>40</sup> Dalmi Iskandar, *Rumah Sakit, Tenaga Kesehatan dan Pasien*, Sinar Grafika, Jakarta, 1999, p. 66.

<sup>41</sup> Veronica Komalawati, *op. cit.*, p. 126.

community that provides health services. Though not necessarily the news conveys the whole thing. This can actually mislead people who actually need help to seek health for their better lives<sup>42</sup>.

The legal relationship between the hospital and the patient is included in the agreement in general which according to Article 1234 of the Civil Code stipulates that "*Each engagement is to give something, to do something, or not to do something.*" In this agreement the hospital's obligation is to do something so that the patient gets cured. Its main action is providing health services which among others are carried out by doctors and nurses<sup>43</sup>. As an agreement, the hospital's relationship with the patient must meet the legal requirements for an agreement regulated in Article 1320 of the Civil Code, namely<sup>44</sup>:

1. The agreement of the parties that bind themselves.
2. The ability of the parties to make an agreement / make an agreement.
3. A certain thing.
4. A lawful cause.

With the above provisions, the process of ensuring legal protection for hospitals and patients occurs with the birth of an agreement that is accompanied by the ability to act in agreements between the hospital and the patient. Patients can file liability claims based on contractual liability as provided for in Article 1239 of the Civil Code, also based on unlawful acts (*onrechtmatigedaad*) as stipulated in Article 1365 of the Civil Code.

The relationship between the hospital and this patient occurs if the patient is competent (*mature and healthy sense*), while the hospital only has a doctor who works as an employee. The position of the hospital is as a party that must provide achievements, while the doctor only functions as an employee (*subordinated to the hospital*) in charge of carrying out the hospital's obligations in other words, the position of the hospital is as the principal and the doctor as the agent. The patient's position is as a party that must provide counter-achievement. While the pattern of the relationship between the hospital and the patient's guarantor occurs if the patient is in an incompetent condition (*minor or unhealthy patient*) because based on civil law, such patients cannot perform legal actions. Here the position of the guarantor of the patient (*parent or family who acts as guardian*) becomes the authority to provide counter-achievement<sup>45</sup>.

The hospital is an organ that has the independence to do legal actions. Therefore, hospitals which are seen as "*recht persons*" are also burdened with rights and obligations. Because it is seen as a legal entity that has rights and obligations, hospitals can be held liable if an act is against the law. Hospitals are institutionally responsible for all consequences that arise with regard to violations of their obligations in carrying out health services<sup>46</sup>.

<sup>42</sup> Case of Nina Dwi Jayanti, 15 February 2009, at the hospital. Cipto Mangunkusumo, where the patient is operated on without family notification; Solihul Case, March 25, 2008, at Mitra Siaga Tegal Hospital; Siska Pakatei Case, 14 April 2010, at Kandou Hospital - Manado, Rendi Nuriski Case, 12 October 2009, at Moh Anwar Hospital - Sumenep; The Daffa Chyanata Oktavianto Case, 30 April 2010, at Krian Husada Hospital; The Prita Mulyasari Case, August 7, 2008, at the Hospital. Omni Tangerang; Case of Jared - Jayden, May 24, 2008, at the Omni Hospital in Tangerang; The Nita Nur Halimah Case, April 2009, at Dr. Syaiful Anwar Hospital, Malang; The Antonia Dando Case, February 2009, at Kupang General Hospital; Haslinda case, April 2007, at the hospital. Jakarta Eyes Center, and many other cases.

<sup>43</sup> Sri Praptiningsih, *Kedudukan Hukum Perawat Dalam Upaya Pelayanan Kesehatan di Rumah Sakit*, Raja Grafindo Persada, Jakarta, 2006, p. 112.

<sup>44</sup> *Ibid*, p. 30.

<sup>45</sup> Margarita Veani Prajati, *Tanggung Jawab Rumah Sakit Privat Di Bidang Pelayanan Kesehatan*, Universitas Atmajaya Yogyakarta, Yogyakarta, 2012, p. 9.

<sup>46</sup> Indar, "*Tanggungjawab Hukum Rumah Sakit Dalam Pelayanan Kesehatan (Suatu Perspektif Hukum Kesehatan Di Indonesia)*", *Jurnal Ilmu Hukum Amanagappa* Vol. 12, Juni, 2004, p. 204-205.

Broadly speaking, hospital responsibilities when viewed from the perspective of the perpetrators can be divided into 3 (three) groups, namely<sup>47</sup>:

1. Responsibility in the field of hospital, the person in charge is the head of the hospital.
2. Responsibilities of the medical field, the person in charge is the respective medical personnel in the hospital.
3. Responsibilities in the field of nursing, the person in charge are each nurse, midwife, and non-medical care in the hospital.

In connection with hospital responsibilities related to personnel, there are 3 (three) doctrines, namely:<sup>48</sup>

#### 1. Vicarious Liability or Superior Respondent

The main principle of this doctrine is that superiors are responsible for all losses incurred by subordinates. The hospital acts as the superior of the hospital staff who acts as a subordinate.

#### 2. Hospital Liability

According to this doctrine the hospital is responsible for all events or incidents in the hospital. In the case of a doctor's mistake, then the responsibility will be taken over by the hospital. The hospital will then use its right of regress to request compensation back from the doctor who made the mistake.

#### 3. Strict Liability

In this doctrine it is held that the hospital is responsible for all events regardless of the hospital's mistakes. Here applies the principle of "*Res Ipsa Laquitor*", namely the facts that speak.

Legal relations between hospitals and patients can also occur in accordance with the provisions of Article 1367 of the Civil Code Paragraph (3) which states that "*Employers and people who appoint others to represent their affairs, are responsible for losses caused by their servants or subordinates in carrying out the work assigned to these people.*" Based on these provisions, responsibility is not limited to responsibilities within the workforce but also outside the workforce where the work is carried out independently both on the leadership of the employer or only on instructions according to with the provisions of Article 1601a of the Civil Code regarding labor agreements. The scope of liability Article 1367 Paragraph (3) includes losses caused by acts that do not include duties assigned to subordinates but have to do with the duties of those subordinates so that the deeds are considered to be carried out in the relationship in which the subordinates are used. This is in accordance with the theory of organs which explains that a legal entity can be held liable on a civil basis under Article 1365 of the Civil Code if the organs commit acts against the law.

According to Permenkes Number 585 of 1989 states that "The person responsible for implementing information and approval is the doctor, in the case of a hospital / clinic, the hospital / clinic is responsible." A doctor who works in a hospital, the doctor also carries out the rights and obligations of the hospital as a legal entity. Because of that, all responsibilities of all doctor's actions that come from rights and obligations are also the responsibility of the hospital<sup>49</sup>. Furthermore, in the relationship between the hospital and the patient, the hospital offers efforts to provide health services by providing facilities, infrastructure, and health resources. Hospitals bear the burden of accountability if the health services provided do not meet hospital service standards, and the standards of the profession of health workers (doctors).

<sup>47</sup> *Ibid.*, p. 207.

<sup>48</sup> *Ibid.*, p. 208.

<sup>49</sup> Bahder Johan Nasution, *op. cit.*, p. 206.

## Conclusion

The legal relationship between doctors and patients in health services, namely the relationship due to the occurrence of therapeutic agreements and the relationship due to the legislation as regulated in Article 1233 of the Civil Code. In a relationship due to a therapeutic agreement, it starts with an agreement (not written) so that the will of both parties is assumed to be accommodated when the agreement is reached. The agreement reached was in the form of approval of medical action or even rejection of a medical action plan. Relationships due to laws and regulations usually arise because of the obligations imposed on the doctor because of his profession without the need for patient approval. Both of these relationships give birth to the legal responsibilities of a doctor towards patients. The legal relationship between the hospital and the patient is included in the agreement generally regulated in Article 1234 of the Civil Code. In this agreement the hospital's obligation is to do something so that the patient gets a cure. Its main action is providing health services which among others are carried out by doctors and nurses. The legal relationship between the hospital and the patient can also occur in accordance with the provisions of Article 1367 of the Civil Code Paragraph (3). The scope of liability Article 1367 Paragraph (3) includes losses caused by acts that do not include duties assigned to subordinates but have to do with the duties of those subordinates so that the deeds are considered to be carried out in the relationship in which the subordinates are used. This is in accordance with the theory of organs which explains that a legal entity can be held civilly liable if its organs commit acts against the law.

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